Petition

No. 81-1832

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MITCHELL LINK and KAREN LINK,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners were denied due process of law under the Fourteenth Amendment to the Constitution of the United States when the Appellate Court of Illinois upheld the admissibility of hearsay statements on grounds different than those relied on by the trial court where such grounds never would have existed had the trial court ruled correctly?

2. Whether Petitioners were denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the admission in evidence of non-verbal statements of Petitioner Karen Link when such statements were elicited in violation of the standards announced in *Miranda* v. *Arizona*, 384 U. S. 436 and under circumstances which rendered the statements involuntary?

3. Whether Petitioners were denied effective assistance of counsel at trial and on direct appeal by the failure of their attorneys to object to the admission of the non-verbal statements of Karen Link?

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

Now comes Mitchell Link and Karen Link and pray that this Court issue its Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District, to review its affirmance of Petitioners' conviction and sentence.

OPINIONS BELOW

The Appellate Court of Illinois, Second Judicial District, affirmed Petitioners' conviction for the offense of murder in a published opinion, *People* v. *Link*, 100 Ill. App. 3d 1000, 427 N. E. 2d 589 (1981). That opinion is reproduced in the

Appendix. On November 13, 1981, that same court denied Petitioners' petition for rehearing. That order is also reproduced in the Appendix. The Supreme Court of Illinois denied Petitioners' petition for leave to appeal. That order is reproduced in the Appendix.

JURISDICTIONAL STATEMENT

Petitioners petition for leave to appeal to the Supreme Court of Illinois was denied February 2, 1982. This Court's jurisdiction is predicated upon Title 28, U. S. C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Fourteen

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioners Mitchell Link and Karen Glabe Link, his wife, were charged with the murder of Kenneth Glabe, Karen Link's then husband.

On June 29, 1971, Kenneth Glabe was stabbed to death a short distance off Highway 173, just outside Zion, Illinois. According to the testimony of Karen Glabe Link, she had become ill at dinner at the Lake Air Restaurant and on the way home had asked her husband to stop the car because she thought she was going to vomit. She testified that after she walked a distance away from the roadway, she was accosted by a man and lost consciousness.

After being found on the roadway in a semi-hysterical state by passersby, Karen Glabe Link was taken to Zion Hospital. A search of the area by authorities led to the discovery of the body of Kenneth Glabe lying face down near a bush.

Lake County Sheriff's Police investigated the killing. It is evident that they regarded Karen Glabe Link as a suspect immediately. Officer Louis Harceg, after examining the crime scene and being made aware that Kenneth Glabe was dead (R. 165-168) was directed to meet the victim's wife, Karen, at Zion Hospital (R. 177). When he arrived at the hospital, Harceg engaged Karen in a conversation. When she asked about the condition of her husband, Officer Harceg told her that her husband was well and would be taken to her shortly (R. 177-178). At trial Harceg testified, without objection from defense counsel, that he got a very startled reaction from Karen as a result of this statement (R. 178).

Further evidence that the Lake County authorities doubted Karen Glabe Link's story is found in the fact that Karen was taken directly from the hospital to the Lake County Sheriff's office for interrogation. Harceg related the story of his false statement regarding the condition of the deceased to First Assistant State's Attorney, Ben Ori (R. 178-179).

Ori testified that he was called by the Lake County Sheriff's Police at his home on June 29, 1971. After meeting with Harceg and being brought up to date on the investigation, Ori proceeded to take a statement from Karen Glabe Link. Ori called a secretary to take the statement down in shorthand (R. 228-229). The statement began at 3:10 a.m., about five hours after the occurrence (R. 230). When he had completed taking the statement, Ori took Karen down to the morgue where the body of Kenneth Glabe was located. The body of Kenneth Glabe was pulled out and the sheet covering the body was pulled down to the waist exposing the head and chest area

(R. 231). The chest area was naked revealing wounds to the chest. At trial Ori testified, without objection, that Karen Glabe Link had no reaction to this display (R. 232).

The State's key witness was Preston Haig. Haig had been arrested in Roswell, New Mexico in 1978, had waived extradition and had been returned to Illinois, where he entered a plea of guilty to the murder of Kenneth Glabe. Prior to Petitioners' trial, Haig was sentenced to a term of fourteen to twenty-eight years imprisonment. A condition of his receiving this sentence was his testimony at the trial of Petitioners (R. 332).

Haig testified that in 1971 he had been acquainted with Mitchell Link. Haig, who had recently been asked to resign as a police officer in Arlington Heights, Illinois, testified that Mitchell Link had approached him regarding finding a hired killer. Haig stated that he volunteered for the job himself. Haig testified that acting on a plan devised by himself and Mitchell Link, he proceeded to ambush and kill Kenneth Glabe in return for a fee of five thousand dollars, which he never collected.

To bolster Haig's credibility, first Haig and then Jeanine Pelletiere, his ex-girlfriend, testified at trial that prior to Haig allegedly murdering Kenneth Glabe, he told her that he had taken a contract to kill someone and that a woman and her lover wanted to kill her husband (R. 373, 569-570).

Haig's statements to Pelletiere were admitted during his direct examination. Long before this, counsel for Petitioners attempted to exclude Haig's conversation with Pelletiere. Counsel advanced a motion *in limine* explicitly directed to that evidence. He raised the limitation on the admissibility of prior consistent statements; that they cannot be used to bolster the in-court testimony of the declarant but only to rebut an inference of recent fabrication. The prosecutor disclaimed any reliance

upon a theory involving prior consistent statements to rebut an inference of recent fabrication, to wit:

> "[t]he State's theory does not include prior consistent statements. We're not offering anything that Haig said to anybody as prior consistent statements" (R 291).

The sole theory upon which the prosecutor sought to justify the admission of the Haig-Pelletiere conversations relied upon the exception to the Hearsay Rule for statements of a co-conspirator in furtherance of the objectives of the conspiracy (R. 290). The trial judge denied Petitioners' motion ruling that the evidence was admissible as the statement of a co-conspirator in furtherance of the conspiracy (R. 298).

Having been permitted to introduce Haig's pre-occurrence statements to Pelletiere, the prosecution on direct examination asked Haig:

> "Q. Did you talk with anyone else at all other than Mitchell Link and this one meeting with Karen Glabe Link, prior to the murder, about the murder?
>
> A. Yes, I did.
>
> Q. With whom?
>
> A. Jeanine Pelletiere.
>
> Q. When in relation to the murder?
>
> A. Probably a few days beforehand.
>
> Q. What was the conversation? (R. 366-367)."

At this point, the defense objected on the grounds that the statements were not in furtherance of a conspiracy. The Court overruled the objection and the questioning continued:

> "Q. What was the conversation with Jeanine Pelletiere?
>
> A. . . .
>
> Q. Just the conversation.
>
> A. I told her that I was going to commit a murder. I told her it was for money, that it involved a love triangle situation and that it would take place in a remote area (R. 373)."

Only after Haig testified on direct and his conversations with Pelletiere were in evidence did defense counsel cross-examine him about his denial of the existence of a conspiracy upon his arrest in New Mexico. Pelletiere testified as to the same conversation.

The Appellate Court of Illinois held that the trial court erred in admitting the testimony under the statement of a co-conspirator rule. However, despite the clear record below, the Appellate Court held that the statement was admissible to rebut the charge of recent fabrication created by the cross-examination of Haig regarding his statement in New Mexico.

The first federal question sought to be reviewed, the admissibility of Haig's prior consistent statement in violation of Petitioner's due process rights and rights to confrontation was first raised at the trial level in defense counsel's motion *in limine* (R. 289). The trial court denied the motion *in limine* (R. 296). The issue was again raised on appeal (Brief for Appellant 65-67).

The second and third federal question, whether Petitioners were denied due process and the right to effective counsel because of the admission of involuntary statements elicited in violation of *Miranda* v. *Arizona*, 384 U. S. 436 was first raised in Petitioners' Petition for Leave to Appeal to the Supreme Court of Illinois.

REASONS FOR GRANTING THE WRIT

1. Petitioners were denied due process of law when the Appellate Court of Illinois upheld the admissibility of hearsay statements on grounds different than those relied on by the trial court when such grounds never would have existed had the trial court ruled correctly.

The guilt or innocence of Petitioners was clearly determined by the credibility of Preston Haig. If Haig was believed,

Petitioners were guilty. But, if the jury believed that Haig, fearing a much harsher sentence for himself, decided to falsely say what the authorities had been waiting to hear for over eight years, it would have returned a verdict of not guilty.

Preston Haig's out-of-court statements to Pelletiere are hearsay consistent with his testimony at trial. Under Illinois law prior consistent statements of a hearsay declarant are not admissible to bolster the in-court testimony of the declarant, *People* v. *Bracey,* 93 Ill. App. 3d 864, 417 N. E. 2d 1029 (1981). *People* v. *DePoy,* 40 Ill. 2d 433, 240 N. E. 2d 616 (1968). They are admissible only to rebut an allegation that the declarant has recently fabricated his in-court testimony. *People* v. *Pointer,* 93 Ill. App. 3d 1064, 418 N. E. 2d 1, 3 (1981); *People* v. *Wurster,* 83 Ill. App. 3d 399, 403 N. E. 2d 1306, 1314 (1980); *People* v. *Clark,* 52 Ill. 2d 374, 389, 288 N. E. 2d 363 (1972). The door, however, must be opened on cross-examination in order for the prior consistent statements to be admissible. In other words, the prior consistent statement can only be admitted after the declarant's testimony has been attacked as a recent fabrication. Otherwise, there is no inference to rebut.

In the case at hand, Haig's prior consistent statements to Pelletiere were admitted before his credibility was attacked or even examined; they were admitted during his direct examination. The trial court admitted the statements as those of a co-conspirator in furtherance of the conspiracy (R. 298). Only after the trial court admitted these statements did defense counsel cross-examine Haig about his denial of the existence of a conspiracy upon his arrest in New Mexico. Had the trial judge correctly ruled that Haig's conversations with Pelletiere were not statements of a co-conspirator in furtherance of the conspiracy, defense counsel, aware of the recent fabrication rule, certainly would not have asked any questions suggesting

recent fabrication. The statements of Haig were already in evidence as statements of a co-consipirator in furtherance of the conspiracy. Counsel, consequently, quite correctly believed it his duty to discredit Haig in any manner available to him.

On appeal the State argued that the statements were admissible alternatively as a co-conspirator's statement or as a prior consistent statement to rebut a charge of recent fabrication. The State argued that the subsequent cross-examination of Haig created the inference that Haig had recently fabricated his conspiracy story and, therefore, the statements were admissible as prior consistent statements to rebut that inference. The State contended that the inference was created when defense counsel asked Haig if he had denied that there had been a conspiracy in the murder of Kenneth Glabe at the time of his arrest in New Mexico (R. 422). The Appellate Court found the trial court had erroneously admitted Haig's statements under the conspiracy exception to the rule against hearsay because the statements were not in furtherance of the conspiracy (Appendix, p. 8). It, however, ruled that defense counsel's cross-examination of Haig created an inference of recent fabrication and, consequently, the testimony of the statements of Haig to Pelletiere were admissible to rebut that inference (Appendix, p. 8). What the Appellate Court failed to realize or chose to ignore is that the key cross-examination occurred after the trial judge had incorrectly ruled the statements admissible and Haig had already testified to them.

The Appellate Court's ruling on this issue amounts to changing the rules in the middle of the game to the Petitioners' detriment. To uphold the admissibility of the statements on grounds different than those relied on by the trial court when those grounds never would have existed had the trial court ruled correctly is a denial of due process of law.

The State's own conception of the nature of the evidence and the theory justifying its admission is clear. In final argument to the jury, the prosecutor utilized the Haig state-

ments to Pelletiere as substantive evidence of the truth of the matter asserted (R. 811-820), a perfectly permissible and proper use of testimony admitted under the conspiracy exception, but a quite impermissible and improper use of testimony admitted for the limited purpose of rebutting an inference of recent fabrication.

We conclude that the theory of prior consistency to rebut recent fabrication is an afterthought. It was an afterthought developed on appeal when the error of the trial court's original ruling became manifest and its importance to the result in the case undeniable.

It is to clarify the relationship between due process and the admission of hearsay which would never have been admitted but for the trial court's erroneous ruling, that we ask this Court to issue its Writ of Certiorari in the captioned case.

2. Petitioners were denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the admission in evidence of non-verbal statements of Petitioner Karen Link when such statements were elicited in a manner which rendered them involuntary and which violated the standards announced in *Miranda* v. *Arizona,* 384 U. S. 436.

Lake County Sheriff's Police Officer Harceg's testimony of Karen Glabe Link's "startled reaction" when falsely told that her husband was well, and First Assistant State's Attorney, Ben Ori's testimony of Karen Glabe Link's "no reaction" when viewing her dead husband's body were improperly admitted. Although the reactions were non-verbal they were nonetheless equivalent to statements and were entitled to the full protection of due process and the warnings required by this Court's decision in *Miranda* v. *Arizona,* 384 U. S. 436.

Petitioners contend that because of the deceptive means employed by the State, Karen Glabe Link's non-verbal statements were involuntary admissions and violated the Due

Process Clause of the Fourteenth Amendment to the United States Constitution. The State psychologically coerced Karen Glabe Link in eliciting her reactions. The means employed in extracting Karen's non-verbal "startled reaction" were deceptive and violated acceptable standards of eliciting a trustworthy response. In *Spano* v. *New York*, 360 U. S. 315 this Court found the use of a confession obtained by deceiving the defendant violative of the Fourteenth Amendment to the Constitution. In this case, Harceg's lie to Karen Glabe Link was similar to that condemned in *Spano*. Harceg's remark that Kenneth Glabe was alive was a deliberate deception meant to extract a confession. Any statement or reaction made in response to such a patent lie is clearly involuntary and cannot be admitted under the principles of due process.

Similar psychological coercion occurred when Karen Link was taken to the morgue. There was no need to take the wife of the victim to the morgue five hours after her husband's death and show her the uncleaned wounds of her husband. The only explanation for such behavior is that it was a ploy, a ploy to induce Karen Glabe Link to confess to a crime which she did not commit.

Petitioners further contend that both of Karen Glabe Link's non-verbal statements were inadmissible because they were taken in violation of the rules of interrogation set out in *Miranda* v. *Arizona*, 384 U. S. 436. This Court held that when a person is subject to custodial interrogation, he must be informed of his privilege against self-incrimination and his right of counsel. Any statements obtained in violation of these rules may not be admitted into evidence without regard to whether the result is a confession or only an admission. Karen Glabe Link, although subject to such custodial interrogation, was not informed of her rights. No *Miranda* warnings were issued during or before Harceg's interrogation which elicited Karen's "startled reaction." Likewise, no warnings were given by Ben Ori before eliciting the "no reaction" statement from Karen

Glabe Link in the morgue. Consequently, both of these non-verbal acts were erroneously admitted into evidence.

3. The failure of Petitioners' trial counsel to object to the admission of Karen Link's non-verbal statements and the failure of Petitioners' counsel to raise this issue on direct appeal denied Petitioners their right to effective assistance of counsel.

CONCLUSION

For the reasons set out above, it is respectfully requested that this Court issue a Writ of Certiorari to the Appellate Court of Illinois for the Second Judicial District to review that Court's judgment in the instant case.

Respectfully submitted,

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Appendix

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No. 80-500

IN THE APPELLATE COURT OF ILLINOIS

Second District

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

MITCHELL LINK AND KAREN LINK,
Defendants-Appellants.

Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois.

Publ. In Full

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Mitchell Link and Karen Link, his wife, were jointly tried and convicted of murder in a jury trial. They were each sentenced to 35-45 years in prison. They appeal, contending that they were not proved guilty beyond a reasonable doubt and, alternatively, that various trial errors deprived them of a fair trial.

The defendants were charged with the murder of Kenneth Glabe, Karen Link's then husband, on June 29, 1971. The principal witness for the State was Preston Haig. He testified that Mitchell Link hired him to murder Kenneth Glabe and that Karen Link participated in the murder plot against her then husband. Haig pleaded guilty to the murder under a plea bargaining agreement with the State and, prior to the beginning of this trial, was sentenced to 14-28 years imprisonment. His truthful testimony at the Links' trial was part of the agreement.

Haig testified that he had become acquainted with Mitchell Link while Link was working at a drug store which Haig visited as a member of the Arlington Heights police department. Haig resigned from the police department in May of 1971 under threat of internal investigation and began experiencing financial difficulties. In early June he said he had a conversation with Mitchell Link and said that the latter recounted his relationship with Karen Glabe and that Kenneth Glabe would not give her a divorce. Haig testified that Mitchell asked if he knew a "hit" man and, after reflection, Haig agreed to kill Kenneth Glabe for $5,000. They planned for the murder to occur on a stretch of Route 173 in a remote part of Zion. Karen was to go to dinner with Kenneth at the Lake-Air Restaurant in Zion. On the way home she would pretend to be sick and ask Kenneth to let her out of the car; would run up a designated path where Haig was waiting in ambush; and Haig would stab Kenneth many times to make it look like a frenzied murder by a "junkie". He also planned to leave a syringe and some Preludin at the scene.

Haig testified that on June 29, 1971, he parked his parents' car at a bowling alley and walked to the ambush site. After waiting an hour he heard a car stop and saw a woman pass by followed by a man. He jumped out and stabbed the man in the back. Thereafter he stabbed the body repeatedly and dragged it behind a bush where he had been hiding. He then hit Karen on the back of the neck as planned and told her to lie down and pretend that she was unconscious. He drove the Glabe vehicle to the bowling alley, left it there, and then drove away in his parents' car. He said he then called Mitchell Link at the pharmacy and told him that it was done and he then drove around and disposed of the weapon, some of his clothing, and threw away the balance of the clothing into a dumpster near his apartment. Haig eventually ended up in Roswell, New Mexico, and lived there with his new wife Deanna under the name of Scott Savage. In April 1979, Deanna told the police about

Haig's involvement in the murder and he was arrested, waived extradition and was taken to Lake County.

In his testimony Haig also related that about a week before the murder he told his then girl friend, Jeanine Pelletiere, that he was going to murder for money, that it involved a love triangle situation and that it would take place in a remote area. He said that a day or two after the murder Pelletiere showed him a newspaper clipping about the Glabe murder, asked him if he was the one that had done it, and that he confirmed that he had. He said that when she asked who hired him he gave her a false name, "Phil". He did not recall if he had asked her for help at this time. He said that his memory was "clouded" about this particular period. After this he had several conversations with Mitchell Link. When he later learned that the police were looking for a man named "Phil" he realized that Pelletiere had talked to the police and he decided then to leave the state. He called Mitchell and told him of his intentions and said that Mitchell told him he would be paid later. Jeanine Pelletiere testified over defendants' objection and corroborated that Haig had made the before and after murder statements to her. Jeanine Pelletiere also testified that possibly two days after the murder in her conversation with Haig, Haig told her he was worried about his call to the Northgate Pharmacy to confirm the killing and that it might be traced. She said that Preston Haig told her that she was to say that she made the call about going out to dinner; and that Preston also wanted her to say that he was at the place where the witness was working on the night of the murder.

Ann DeMillo testified that at about 10:30 p.m. on June 29, 1971, she was driving on Route 173 and saw what she thought was a child lying on the side of the road. She stopped, as did another motorist, and the person, identified later as Karen Link, began scooting away saying "get away from me". The police were called and Karen related that she and her husband were driving home after dinner, that she felt sick, asked her

husband to stop and went to the weeds to "heave" when someone grabbed her and knocked her out. DeMillo testified that Karen went from calmness to hysteria while relating the story.

A number of police officers who responded to the call or participated in the investigation testified as to their observations at the scene and their investigation of the murder. A number of neighbors testified to seeing Mitchell Link at the Glabe residence frequently shortly after the murder. There was testimony that Karen Link showed a lack of mourning over her husband's death. Several witnesses also testified as to the amounts of money which Karen Link received as the result of her husband's death from his life insurance policy, the Veterans Administration, and social security. There was also testimony that Karen took an overdose of sleeping pills on August 6, 1971, the day she was served with a grand jury subpoena.

Deanna Savage, the wife of Preston Haig testified, over an objection that had been made at an *in limine* hearing. She said that in the period between October 9, 1971 and October 16, 1971, she had a conversation with Preston Haig in her apartment in Long Beach, California, in which he asked if she would make a phone call for him. She said she then went to San Pedro, which is some 9 or 10 miles from Long Beach, to a public phone booth where she again had a conversation with Haig. She related that Haig told her he was going to dial the number and that he needed her to ask for "Mitch" because he was afraid that his voice would be recognized; and that they might answer as a pharmacy. He dialed a long distance number, handed her the phone, she asked to speak to Mitch and a voice answered "I am Mitch". She said she then handed the phone back to Haig and returned to her car; that when Haig rejoined her he told her he had been indicted by the grand jury and asked her if he could have money wired to him in her name to which she agreed. Over objection the witness was not allowed to go into a further conversation with Haig later that

evening, pursuant to an *in limine* ruling that she could only testify as to the money. The witness testified that Haig had advised her that $1,000 would be wired to the Western Union in Long Beach. When she arrived there she received a check with "Mitch's" name on it in the amount of $600, which she gave to Haig, receiving $200.

Both defendants testified and denied planning the murder. They both admitted that they had an adulterous relationship in 1970 and that Karen had asked Kenneth for a divorce and that he had refused. Mitchell admitted sending $600 to Preston Haig, but claimed it was repayment for a loan he had gotten from Haig.

The record fully supports our conclusion that defendants were proved guilty beyond a reasonable doubt. The testimony of Preston Haig clearly proves a conspiracy between the defendants and himself to accomplish the murder of Kenneth Glabe. Essentially, defendants argue that the testimony of Haig as a claimed accomplice is unworthy of belief because of inconsistencies, contradictions and because of the benefit he was getting from his plea bargain.

From the whole record, the inconsistencies appear trivial in comparison with the many points upon which Haig's testimony has been corroborated by the testimony of other witnesses and by many circumstances. The plea bargain under which Haig had already been sentenced which was conditioned only on his truthful testimony at this trial does not, on the record before us, show a sufficient reason to view the testimony of the accomplice as unworthy of belief; and the jury has resolved the issue of credibility by its verdict.

The most serious of defendants' claims of prejudicial trial error involve the admission of the extra-judicial statements attributed to Preston Haig by Jeanine Pelletiere. The first statement made before the murder, was Haig's relating to Pelletiere that he had taken a contract to kill a man together

with other details of the plan. The second, made possibly two days after the murder, was Haig's admission that he committed the murder and was hired by a man named "Phil", as well as his request that Pelletiere provide him with an alibi.

The defendants argue that their constitutional rights to confront witnesses and to cross-examine witnesses who testify against them was violated when Pelletiere was permitted to testify to statements allegedly made by Preston Haig but which he did not remember making. They argue that this unfairly bolstered the credibility of Haig who could not be cross-examined on the issue because of his lack of recall. The State maintains that the statements are admissible as declarations of a co-conspirator explaining a common plan or conspiracy as an exception to the hearsay rule. The State also argues that since on cross-examination defense counsel asked Haig whether he had denied any conspiracy shortly after his arrest in New Mexico, the pre-murder statement is admissible to rebut the inference of recent fabrication.

We do not agree with that portion of the State's position which is to the effect that the declaration of co-conspirators to be admissible must merely explain the common plan or conspiracy. We conclude that such declarations must be in furtherance of the conspiracy to be admissible.

Declarations of one conspirator made during the pendency of a conspiracy may be used against both conspirators on the theory that the declarant is the agent of his co-conspirators but "only when made in furtherance of the conspiracy". *People* v. *Davis,* 46 Ill.2d 554, 558 (1970); *People* v. *Goodman,* 81 Ill.2d 278, 284-85 (1980). See, also, *People* v. *Thomas,* 38 Ill.App.3d 689, 692 (1976) and Annot., 46 ALR3d 1148, 1155 (1972).

We cannot support the testimony of Pelletiere as to Haig's declaration of his plan to commit the murder in conspiracy with others, made prior to the murder. We fail to see, and the State has not indicated, how the pre-murder statements to one who was not a co-conspirator can be termed in furtherance of the conspiracy.

However, in our view, the pre-murder statements were properly admissible under the second theory suggested by the State, to rebut the inference of recent fabrication created by the defense on cross-examination of Haig. While the defendant argues that the questions asked did not suggest that Haig's testimony was of recent fabrication we believe that that is a fair characterization of the questioning. The implication of asking Haig whether he denied any conspiracy shortly after his arrest in New Mexico fairly suggests an inference that Haig was fabricating his testimony implicating the Links some time after his denial. *People* v. *Clark,* 52 Ill. 2d 374, 389 (1972). See, McCormick, Evidence § 49, at 106 (2d Ed. 1972).

We also conclude that the statements made after the crime were for the purposes of concealment and were admissible. Using the name "Phil" as that of the co-conspirator Mitchell Link was an effort at concealment. Similarly the attempt to create an alibi was to conceal Haig's involvement in the conspiracy as well as Link's. "[A] conspiracy includes subsequent efforts at concealment, * * * if those efforts are proximate in time to the commission of the principal crime." In *People v. Meagher,* 70 Ill.App.3d 597 (1979), a declaration made the morning following the crime was held to be proximate in time to the commission of the underlying offense. (See, also, *People v. McInnis,* 88 Ill.App.3d 555, 565-66 (1980).) Here, Haig's statement to Pelletiere was within two days of the commission of the crime and was directed at concealing his involvement. We therefore conclude that it was properly admissible since it was close enough to the commission of the offense as not to be subject to serious doubts as to trustworthiness. (See, *People v. Meagher,* at 603). Although there was a long interval between the making of the declaration and the testimony of the witness the circumstances would suggest that the matter was one which the witness would very likely have remembered.

While the defendants have sought to place the testimony of Deanna Savage (Haig) in the same category as the declarations testified to by Pelletiere, the record does not support this position. The witness was permitted only to testify to what she did with reference to the transfer of money from Mitchell Link to Haig. Mitchell Link in his testimony did not deny sending the $600 but sought to explain the transaction at variance with the testimony of Haig.

Defendants also argue that colored slides of the deceased as shown to the jury over objection were inflammatory and aroused their passion and prejudice. However, the slides have not been made a part of the record on appeal and the alleged error was not raised in a post-trial motion. By failing to raise the alleged errors in a post-trial motion, defendants have waived these issues for purposes of appellate review except on a theory of plain error. (*People* v. *Tannenbaum*, 82 Ill. 2d 177, 181-82 (1980).) We cannot determine the inflammatory nature of the slides as they are not in the record. The trial court specifically ruled that the slides were not so gruesome as to be inflammatory. In this posture, we deem the error, if any, waived. Moreover recent cases have upheld the introduction of even gruesome colored photos of a deceased on the theory that they were relevant to a fact in issue. (*People* v. *Foster*, 76 Ill.2d 365, 377 (1979); *People* v. *Campbell*, 77 Ill.App.3d 804, 817 (1979).) Here the slides were relevant to corroborate Haig's testimony as to the manner in which the wounds were inflicted.

We will comment briefly on the remaining claims of error which we do not find persuasive as grounds for reversal.

Defendants objected at trial to the giving of an instruction that the State was not required to prove a motive for the commission of the crime (IPI Criminal 3.04) since, as the record shows, motive was argued to the jury. We agree that it is error to give the instruction when the State produces evidence of motive or argues motive to the jury (*People* v. *Manzella*, 56

Ill.2d 187, 199 (1973); *People* v. *McClure*, 80 Ill.App.3d 10, 17 (1979).) However, in both of these cited cases and all others cited by the defendants the reviewing court has found the error to be harmless under the particular circumstances. We also conclude that on this record the error did not deny the defendants real justice or influence the jury's verdict (*People* v. *Manzella*, at 200) and was therefore harmless beyond a reasonable doubt.

We also conclude that the court did not err in refusing to allow defendants to impeach the State's witness Deanna Savage (Haig) by her conviction of a felony in 1968 from which she was released from prison in 1969, more than ten years prior to her testimony. (*People* v. *Montgomery*, 47 Ill.2d 510, 516 (1971).) And, the issue was waived as it was not raised in the post-trial motion. Even if we were to consider it under the rule of plain error, defendants' position that the *Montgomery* ten year rule only applies to defendants and not other witnesses is untenable. See, *People* v. *Warmack*, 83 Ill.2d 112, 124 (1980).

Defendants argue that testimony by State witnesses concerning their adulterous relationship was irrelevant and prejudiced them by informing the jury of their bad moral character. The defendants did not object at trial to this testimony and therefore have waived the issue. In any event, the evidence was obviously relevant to prove motive and did not constitute the kind of irrelevant bad character condemned in the cases cited by defendants. See, e.g., *People* v. *Butler*, 58 Ill.2d 45, 50 (1974); *People* v. *Bailey*, 77 Ill.App.3d 953, 957 (1979).

Finally, we find no basis for defendants' claim that the prosecutor's closing argument contained reversible error. The first argument complained of is an improper assertion of the prosecutor's personal belief but it is in no way egregious or inflammatory. The second argument, asserted to be a misstatement of evidence, appears to accurately recount the evidence as we review the record. Defendants did not object at trial to either of the comments nor raise them in the post-trial motion and in no sense do we find that they rise to the level of plain error.

The judgments are therefore affirmed.

Affirmed.

REINHARD and HOPF, JJ., concur.

OFFICE OF THE CLERK
312-695-3750

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
ELGIN, ILLINOIS 60120

November 13, 1981

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:
Gen. No. 80-500

People of the State of Illinois, Appellee v. Karen Louise Link and Michael G. Link, Appellants.

Petition by defendants-appellants for rehearing denied.

LOREN J. STROTZ,
Clerk

Lance Haddix
Hon. Dennis Ryan
Phyllis J. Perko
William Browers

55932

ILLINOIS SUPREME COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2036

Robert H. Gillespy
Clerk

February 2, 1982

Mr. Paul Bradley
Attorney at Law
53 W. Jackson Blvd., S#1220
Chicago, IL 60604

No. 55932—People State of Illinois, respondent, vs. Mitchell Link, et al., petitioners. Leave to appeal, Appellate Court, Second District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court